Supreme Court, U. S.
FILED
DEC 9 1977
MICHAEL RODAK, JR., CLERK

No. 77-487

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN D. FRAZIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

WILLIAM G. OTIS,
WILLIAM C. BROWN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-487

JOHN D. FRAZIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 560 F. 2d 884. The earlier opinion of the court of appeals (Pet. App. A15-A24), reversing the district court's suppression order, is reported at 538 F. 2d 1322. The district court opinion (Pet. App. A26-A28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1977. A petition for rehearing was denied on August 29, 1977. The petition for a writ of certiorari was filed on September 28, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether conduct within the plain language of the Hobbs Act (18 U.S.C. 1951) is nonetheless not proscribed by that Act unless it is also proven to constitute "racketeering."

2. Whether the warrantless placement of an electronic tracking device (a "beeper") upon the exterior of petitioner's automobile by FBI agents acting on probable cause and under exigent circumstances, or the subsequent monitoring of the signals emitted by the device as petitioner drove on public roads, violated petitioner's Fourth Amendment rights.

STATEMENT

A one-count indictment filed December 11, 1975, in the United States District Court for the Eastern District of Missouri charged petitioner with attempted extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. Prior to trial petitioner moved to suppress certain evidence seized with the aid of an electronic tracking device that government officers had attached to his automobile (Pet. App. A29-A30). After a hearing, the district court ordered the evidence suppressed (Pet. App. A26-A28). The court of appeals reversed (Pet. App. A15-A24; 538 F. 2d 1322), and this Court denied a petition for a writ of certiorari (Pet. App. A14; 429 U.S. 1046). Following a jury trial, petitioner was convicted and sentenced to ten years' imprisonment. The court of appeals affirmed (Pet. App. A1-A11).

The evidence at trial and at the hearing on the motion to suppress established that on November 24, 1975, James Clayton received a telephone call from an unidentified individual who spoke vaguely of an opportunity for

Clayton to earn $50,000 (H. Tr. 22; Tr. 4-5).[1] Clayton reported this conversation to the Federal Bureau of Investigation, consented to the monitoring of his telephone calls, and agreed to feign compliance with the caller's requests. On November 25, the anonymous caller telephoned Clayton again, this time revealing his plan to chain a belt containing explosives to a wealthy individual (whom the caller did not identify) and to remove the belt only upon payment of a large sum of money (H. Tr. 27-30, 38).

On November 30, the FBI identified petitioner as the caller (H. Tr. 24; Tr. 67, 162). Clayton then realized that he knew petitioner as a retired naval officer who was an explosives expert (H. Tr. 25; Tr. 15). That evening petitioner and his car were seen at a motel near the airport.

At 2:00 p.m. on December 1, petitioner telephoned Clayton and named Clarence Barksdale, president of the First National Bank in St. Louis, Missouri, as his intended victim (Pet. 7; Pet. App. A2). Petitioner also revealed that the extortion plan was to be executed the next morning (Pet. App. A2; H. Tr. 29-31, 37-39). At a meeting held at 4:30 p.m. on that afternoon, the investigating agents decided to attach a battery-operated electronic tracking device (a "beeper") to petitioner's car in order to assist in monitoring his movements. At approximately 6:30 p.m. an agent attached the beeper to the exterior of petitioner's automobile while it was parked in a motel parking lot (H. Tr. 5-6; Tr. 55-57).

That evening petitioner provided Clayton with the explosive belt (upon later examination it was found to contain no actual explosives) (Tr. 76, 86-93, 97). On the

---

[1] "H. Tr." refers to the transcript of the suppression hearing. "Tr." refers to the trial transcript.

morning of the following day Clayton pretended to carry out his part in the plot by driving to Barkdale's house and going through a charade of placing the belt around an FBI agent impersonating the victim (Tr. 32, 41, 94). Petitioner was seen in the area of the house but did not contact anyone at that time (Tr. 33).

Later that morning petitioner telephoned Barksdale at the bank and demanded that $150,000 be taken to the local airport (H. Tr. 44; Tr. 113). Bank bags stuffed with paper and topped with approximately $105 in currency were taken to the designated location (Tr. 111, 114). The agents had planned to arrest petitioner when he picked up the money. Petitioner was seen at the airport, but he departed without attempting to take possession of the bank bags (H. Tr. 46; Tr. 61, 64, 73, 84, 120, 163, 174). Two agents were then dispatched to obtain an arrest warrant, while others sought to locate petitioner (H. Tr. 47). With the aid of a helicopter equipped with a device to monitor the signals transmitted by the beeper, petitioner's car was located on a street in O'Fallon, Missouri (H. Tr. 8-9, 48; Tr. 119-121). Petitioner was arrested there that afternoon. A search of his person incident to the arrest produced a page of a telephone book bearing the name of James Clayton and a business card containing Barksdale's name and address (Tr. 125-129)[2].

ARGUMENT

1. Petitioner contends (Pet. 10-13) that conduct within the plain language of the Hobbs Act (18 U.S.C. 1951)—here, the attempted extortion of $150,000 from a national

[2]Other incriminating items were obtained from subsequent searches of petitioner's automobile and home. The district court found that petitioner and his wife consented to these searches (H. Tr. 77-78), and the correctness of that determination is not in issue here.

bank—is nonetheless not proscribed by the Act unless it is also proven to constitute "racketeering." The propriety of this construction of the statute is presently before the Court in *United States* v. *Culbert*, No. 77-142, certiorari granted October 3, 1977, which also involves an attempted bank extortion. The Court should therefore hold this petition pending the decision in *Culbert* and then dispose of it accordingly.[3]

2. Petitioner also contends (Pet. 13-20) that the warrantless use of an electronic beeper to locate his car violated the Fourth Amendment and that therefore the evidence seized at the time of his arrest should have been suppressed. The Court has twice recently declined to review this issue,[4] and there is no reason for a different result here.

Measured against the Fourth Amendment's guiding standard of reasonableness, the agents' conduct in this case was not unlawful. They had probable cause to believe that petitioner planned to extort money by endangering someone's life with explosives, and they feared that others unknown to them might also have been involved (see Tr. 123). Petitioner had no reasonable expectation of privacy in the exterior of his automobile while it was parked in the public lot, or in his movement in his car on the public roads. See *Cardwell* v. *Lewis*, 417 U.S. 583, 590. The monitoring of the beeper neither captured private conversations nor invaded any private sanctuary. See *Katz* v. *United States*, 389 U.S. 347. Rather, it merely

[3]We are sending petitioner a copy of our brief in *Culbert*.

[4]In addition to the denial of petitioner's earlier petition, which presented the same argument, see *Hufford* v. *United States*, 539 F. 2d 32 (C.A. 9), certiorari denied, 429 U.S. 1002.

enabled the agents to do more efficiently what they might otherwise had done using their eyesight alone—*i.e.*, follow petitioner. In that respect, the use of the beeper was similar to the use of other detection aids—such as radar or tracking dogs—that may augment the senses of law enforcement officials yet not impinge unreasonably upon a suspect's legitimate expectation of privacy. Given the exigencies of the circumstances and the minimal intrusion on petitioner's privacy, it was reasonable for the agents to install and monitor the beeper, and petitioner's Fourth Amendment rights were accordingly not violated.[5]

3. Contrary to petitioner's suggestion (Pet. 6), there is no conflict among the circuits regarding the use of beepers to monitor the location of automobiles. A panel of the Fifth Circuit ruled that the warrentless use of a beeper attached to an automobile bumper violated the Fourth Amendment in *United States* v. *Holmes*, 521 F. 2d 859,

---

[5]Even if it is assumed, contrary to our view, that the warrant clause applies here, the agents' conduct was lawful under the exigent circumstances doctrine, as the court below ruled (Pet. App. A9, n. 5; A19-A20). See *Chambers* v. *Maroney*, 399 U.S. 42; *Warden* v. *Hayden*, 387 U.S. 294; *Carroll* v. *United States*, 267 U.S. 132. Petitioner argues that exigent circumstances did not exist because the agents "had all day on December 1 to obtain the necessary warrant" (Pet. 19). But it is settled that exigent circumstances do not dissipate because agents do not obtain a warrant at the first practicable moment. *Cardwell* v. *Lewis*, *supra*, 417 U.S. at 595; see *United States* v. *Mitchell*, 538 F. 2d 1230, 1233 (C.A. 5) (*en banc*). In this case the existence of exigency should be measured, not from the time the agents learned of petitioner's identity and location on the evening of November 30, but from the time of telephone conversations on the next afternoon when the agents learned that the execution of the plot was imminent. At that point the agents acted quickly (and upon probable cause) to place the beeper on petitioner's car in order to monitor its location. The crime and the investigation were continuing, and without prompt action petitioner's car could easily have been moved to an area where attachment of the beeper might have been impossible.

but that decision was withdrawn and upon rehearing *en banc* the Fifth Circuit divided evenly on the issue (537 F. 2d 227), a disposition having no precedential effect. See *Carter* v. *United States*, 325 F. 2d 697, 698 (C.A. 5) (Jones, J., concurring). In another Fifth Circuit case the court upheld the placement and monitoring of a beeper inside a package to be delivered to the defendant. *United States* v. *Perez*, 526 F. 2d 859 (C.A. 5), certiorari denied, 429 U.S. 846.[6] The only other circuits to have considered the question have held that law enforcement officials acting on probable cause are not required to obtain a warrant before attaching a beeper to an automobile. *United States* v. *Moore*, 562 F. 2d 106 (C.A. 1); *United States* v. *Pretzinger*, 542 F. 2d 517, 520 (C.A. 9); *Hufford* v. *United States*, *supra*.

CONCLUSION

The petition should be held pending the decision in *United States* v. *Culbert*, *supra*, and then disposed of accordingly.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

WILLIAM G. OTIS,
WILLIAM C. BROWN,
Attorneys.

DECEMBER 1977.

---

[6]Accord, *United States* v. *Emery*, 541 F. 2d 887, 889-890 (C.A. 1); see also *United States* v. *Bishop*, 530 F. 2d 1156 (C.A. 5).